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**ATTORNEY GENERAL GUIDELINES FOR FBI
CRIMINAL INVESTIGATIONS, NATIONAL
SECURITY INVESTIGATIONS, AND THE
COLLECTION OF FOREIGN INTELLIGENCE**

HEARING
BEFORE THE
SELECT COMMITTEE ON INTELLIGENCE
OF THE
UNITED STATES SENATE
ONE HUNDRED TENTH CONGRESS
SECOND SESSION

SEPTEMBER 23, 2008

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ATTORNEY GENERAL GUIDELINES FOR FBI CRIMINAL INVESTIGATIONS, NATIONAL SECURITY INVESTIGATIONS, AND THE COLLECTION OF FOREIGN INTELLIGENCE

SEPTEMBER 23, 2008

U.S. SENATE
SELECT COMMITTEE ON INTELLIGENCE
Washington, DC.

The Committee met, pursuant to notice, at 2:37 p.m., in Room SH-216, Hart Senate Office Building, the Honorable Jay Rockefeller (Chairman of the Committee) presiding.

Committee Members Present: Senators Rockefeller, Wyden, Feingold, Whitehouse, and Bond.

OPENING STATEMENT OF HON. JOHN D. ROCKEFELLER IV, CHAIRMAN, A U.S. SENATOR FROM WEST VIRGINIA

Chairman ROCKEFELLER. The Committee will come to order.

Today the Senate Intelligence Committee examines issues related to the proposed Attorney General guidelines governing the activities of the Federal Bureau of Investigation within the United States.

In early August, Attorney General Michael Mukasey contacted me and other leaders of the congressional Intelligence and Judiciary Committees to inform us that he would soon issue a new set of guidelines for the FBI to consolidate and harmonize five existing sets of investigative guidelines. These guidelines pertain to general crimes investigations, national security investigations, the collection of foreign intelligence information and reporting on civil disorders and demonstrations.

The Attorney General later agreed to postpone issuing those proposed guidelines until after Congress had held hearings this month to examine them. I appreciate the Attorney General's decision to consult with Congress and his willingness to seek comments on the proposed guidelines, not only from the Hill, but also from selected representatives of civil liberties organizations on a read and return basis, which has already taken place.

I regret, however, that the proposed guidelines have not been publicly released, by which I mean in a broader sense for broader debate and broader comment, not just the people who would cluster about the subject, but broader than that, because this is a huge decision. Circulating the actual proposed guidelines would be a constructive step in generating additional review and commentary.

The Justice Department's decision to prohibit the Committee from retaining a copy of the draft guidelines in preparing for this hearing and to restrict their public distribution has been unhelpful and has unnecessarily complicated our review of them. In light of the recently documented abuses in the FBI's use of national security letters and continued concerns going back to 9/11 with the Department's ability to carry out the national security mission, the Committee wants to ensure that the new guidelines are not only effective, but subjected to sufficient oversight.

Last week Federal Bureau of Investigation Director Bob Mueller testified on the proposed guidelines before the House and Senate Judiciary Committees as part of the broader oversight hearings of the FBI. It is important, nevertheless, that the Intelligence Committee also consider the proposed guidelines, as their most important features concern the intelligence activities of the FBI.

Our witnesses today are Assistant Attorney General Beth Cook and FBI General Counsel, Valerie Caproni. Both are able public servants, and they are experts within the Department on these issues. They are, in fact, the experts. We welcome their appearance before the Committee.

I regret that neither the Attorney General nor the Deputy Attorney General were available to accept our invitation to join our witnesses in testifying on this important topic. But that's sort of for the record.

Over the last 32 years, the Attorney General—in fact, since Edward Levy issued the first set of guidelines to establish direction and control over the internal security activities of the FBI, Attorney General guidelines have been a signature pronouncement of the nation's top legal officer.

As the Levy guidelines have been revised over the years—and they have a number of times, including up until just a few years ago—and emerging investigative issues have been addressed, these guidelines have represented what the Attorney General thinks is the appropriate balance between the government's duty to prevent crime and to deter threats to the national security and the protection of the rights of Americans under the Constitution and the rule of law. In striking that balance, the guidelines have been highly important to the Congress.

As the Inspector General of the Department of Justice observed in a report on the FBI's compliance with existing guidelines, "The adoption of the Levy guidelines were a factor in the decision by Congress in the late 1970s and early 1980s not to enact a statutory charter for the FBI." Simply put, the guidelines have given Congress confidence that the nation's highest law officer had acted and would continue to act to ensure that the FBI abuses exposed in the 1970s, which led to a variety of things, would not be repeated.

Over the course of time, Attorneys General have not only amended the original guidelines, but have issued additional sets of guidelines. With respect to the Justice Department new proposal, it may be appropriate, as our witnesses will no doubt urge, to consolidate and make consistent the five sets of Attorney General guidelines, particularly in the area of checking leads and conducting investigations involving international terrorism, where the guidelines overlap to the greatest degree.

This Committee has pushed the Department of Justice and the FBI to make improvements in the FBI's work as an intelligence agency. Consolidated and clarified Attorney General guidelines could represent an improvement for FBI agents and analysts, if they are carefully written with appropriate safeguards to prevent abuse and ensure accountability.

The Department of Justice and the FBI, however, need to make the case why FBI agents need greater latitude to use sensitive investigative techniques such as physical surveillance and pretext interviews that may mislead law-abiding American citizens, particularly outside of the terrorism context, without the factual predicates, higher level of approval and periodic review and renewal that have been required, not only before 9/11, but in Attorney General guidelines issued since that time.

We'll also want to hear whether sufficient safeguards are built into the proposed guidelines and resources provided to protect the constitutional and legal rights of Americans through appropriate oversight authorities given to the national security division and other components of the Department of Justice.

Before turning to the Vice Chairman for his opening remarks, I want to take a few moments to acknowledge the exemplary work of two members of our Committee who will be retiring from the Senate at the end of Congress, and it saddens me that they're not here at this particular moment because of their extraordinary service.

And so, with the indulgence of my colleagues, I would just say that John Warner and Chuck Hagel have been absolutely invaluable to this Committee, not only in their knowledge, in their diligence, in their aggressiveness, in their intellectual curiosity, but also because of their distinguished personal characteristics.

They're among the hardest working and the most knowledgeable members ever to sit on this Committee. We're losing both of them. It'll be very, very hard to fill those positions. Over the many years of their service at countless hearings and business meetings, Senator Warner and Senator Hagel have been strong and the key is very independent advocates for strengthening our intelligence community and keeping America strong. I personally will miss them both in every way.

I now turn to Vice Chairman Bond for any remarks he would like to make.

**OPENING STATEMENT OF HON. CHRISTOPHER S. BOND, VICE
CHAIRMAN, A U.S. SENATOR FROM MISSOURI**

Vice Chairman BOND. Thank you very much, Mr. Chairman. I join with you in wishing well our departing members and will pass along to them your very kind words.

I'm pleased the Department of Justice and the FBI have taken the unprecedented step of consulting with Congress prior to the adoption of the guidelines. It make sense for us to discuss the merits of these consolidating guidelines prior to their adoption.

And I welcome Ms. Caproni and Ms. Cook. We appreciate your service and look forward to your testimony.

The new FBI guidelines, as has been indicated, trace their roots back to 1976, when Attorney General Ed Levy issued classified

guidelines governing FBI counterintelligence and foreign intelligence investigations. These have been revised over the years, never an easy process. The last one occurred under General Ashcroft in 2003.

That process took almost two years from the time the FBI formally requested an update of its foreign and counterintelligence guidelines. And there was a general consensus after 9/11 that the FBI's FCI guidelines were outdated and didn't provide sufficient flexibility to allow the FBI effectively to prevent and neutralize terrorist threats.

Two main goals of the 2003 revision process: first were to remove the walls preventing the sharing of information within the FBI; second, to make the FCI guidelines as flexible as the FBI's criminal guidelines. They were a significant improvement over previous ones, and the FBI recognized that there were still key differences, however, between the criminal and intelligence guidelines.

Before addressing some of those differences, I note that these guidelines are novel in that they govern both the FBI criminal investigations and intelligence operations. I think this consolidated approach simultaneously eliminates any remaining information-sharing walls, creates a framework under which the FBI intelligence activities can be conducted with the same flexibility as criminal investigations and operations.

Now, this is a good thing. If we expect the FBI to be able to protect us against threats of terrorism and other national security threats, we should at least permit them the same latitude with all lawful steps to neutralize those threats, including those used every day to put ordinary criminals in jail.

Additionally, these guidelines are basically unclassified, a remarkable departure from the past. We hope this will bolster public confidence.

One of the key improvements in the 2003 guidelines was the creation of a threat assessment concept, clearly laying out activities the FBI could utilize prior to opening a formal preliminary or full investigation. The techniques available were based upon some of the activities permissible under the "prompt and limited checking of leads" authority contained in the criminal guidelines. These new guidelines merge the two concepts under the category of assessments.

It appears to consolidate a list of authorized assessment techniques, borrow the best from both sets of guidelines. It's important to remember that the real value of the assessment phase is to allow the FBI to use non-invasive techniques to determine quickly how best to invest its analytical and investigative resources.

Without these assessment tools, the only alternative for the Bureau is to go through the bureaucratic step of opening up a predicated investigation, only to learn after one phone call there was no substance to it. Worse, the lack of an assessment phase keeps the FBI in a reactive mode and limits its ability to spot potential threats or criminal activities just over the horizon.

Another improvement, I think, allows recruiting and tasking of sources during an assessment. Under the national security investigative guidelines, the FBI can only interview previously-established assets or sources during a threat assessment. The criminal

guidelines never contained such a restriction. This restriction is not practical if the goal of an assessment is to help prevent an attack or quickly rule out an innocent person. Why should they be limited to going to previous sources?

It makes sense the FBI should be allowed to task an existing source or recruit a new asset to gather information related to a threat or a future criminal enterprise in order to run to the ground the truth as quickly as possible. The ability to recruit and task assets during the “limited checking of leads” phase has worked well for years under the criminal guidelines. The authority to use this technique is long-overdue, in my view, in the national security context.

Another technique long available prior to the opening of a predicated investigation is to engage in observation or surveillance not requiring a court order. The current investigative guidelines do not explicitly authorize the use of such observation or surveillance during a threat assessment. But it’s often useful in situations in which an unknown individual is meeting with a subject of a current investigation.

In these situations, a photograph or physical surveillance that yields a license plate number or a street address should allow the FBI to use other assessment authorities to assess the need for additional investigations. And additionally, an important technique that’s been included in the new guidelines, taken from guidelines, is the authority to conduct a pretext interview, simply an interview where an FBI agent does not disclose the FBI affiliation.

It could be something as simple as a phone call to make sure that phone’s being used by the investigation subject. Or it could be something more dangerous, like talking to a suspected drug dealer who might not react favorably to knowing he’s being interviewed by an FBI agent. They tend to be a little bit shaky about that.

Again, the technique has been routinely available to criminal investigators. I see no reason why it should not be used in the national security context, where we’re talking about keeping our homeland, our families, you and me safe here in the United States.

The guidelines contain a number of other key improvements that I strongly endorse. The FBI will now be able to obtain information from foreign governments during the assessment phase. Criminal investigations will be able to access commercial databases during the assessment phase. The FBI may continue to use enterprise investigations focusing on comprehensive investigations of a group or organization.

The FBI will be explicitly authorized to be more proactive in the use of assessment techniques in the conduct of strategic analysis. The guidelines maintain the historical respect for the least intrusive means concept and the exercise of First Amendment and other protected rights. And the guidelines explicitly preserve the application of the Attorney General’s guidance regarding the use of race by federal law enforcement agencies.

I wrap up by thanking you and all the men and women who participated in what must have been a long and tedious negotiation and approval process. It appears to me that all the hard work was well worth it. The guidelines, in our view, are a marked improvement over the predecessor guidelines and should protect both our

civil liberties and our national security. Please convey our congratulations to the Attorney General and the team. I would urge that the Attorney General issue the guidelines immediately.

Thank you, Mr. Chairman.

Chairman ROCKEFELLER. Thank you.

And, Ms. Cook, we would be delighted to hear from you first, if that is your preferred order.

**STATEMENT OF ELISEBETH COLLINS COOK, ASSISTANT
ATTORNEY GENERAL, OFFICE OF LEGAL POLICY,
DEPARTMENT OF JUSTICE**

Ms. COOK. Mr. Chairman, Vice Chairman Bond and members of the Committee, thank you for the opportunity to appear before you today to discuss the Attorney General's guidelines for domestic FBI operations.

As discussed in depth in our joint statement for the record, we believe that these guidelines will help the FBI continue its transformation from the preeminent law enforcement agency in the United States to a domestic intelligence agency that has a national security mission and law enforcement mission.

The changes we have made to the guidelines have been focused and relatively narrow. First and foremost, we have increased the range of techniques that would be available to assess the potential threat to national security to include techniques already available at the same investigative stage when tracking down a lead as to criminal activity—specifically, allowing agents to recruit and task sources, conduct physical surveillance that does not require a court order and conduct interviews without explicitly identifying themselves as agents for the precise purpose of the interview, so-called pretext interviews.

In practice, we believe that these changes will allow the FBI to take significant steps forward in its change to a proactive intelligence-driven agency.

Second, the consolidated guidelines reflect a change in approach to oversight on the national security side, one that we believe will result in more comprehensive and effective oversight over time. The guidelines reflect a shift in oversight that was accomplished primarily through notice to main Justice and filings to the FISA court to oversight now accomplished through a combination of a dedicated oversight unit within the national security division, the Department's Office of Privacy and Civil Liberties, a dedicated compliance unit within the FBI, on-site audits, notices, filings with the FISA court and reports.

Perhaps equally important to today's discussion, though, is a brief description of what we have not changed in the draft consolidated guidelines. In 2003, the Attorney General issued new guidelines governing the investigation of threats to the national security. Reflected in that set of guidelines was an important and novel approach for national security cases, namely, that there must be available some level of information gathering prior to the opening of a formal investigation.

In the national security guidelines, that level of activity was the threat assessment. On the criminal side, the FBI already had the ability to check out leads without opening a formal investigation.

We have carried that basic notion in structure into the consolidated guidelines.

The ability to ask and answer questions such as whether there is a presence of a particular terrorist organization in a given field office is not a new one to the consolidated guidelines. What we have tried to do instead is to allow the FBI to answer that question more efficiently and more effectively through additional techniques, techniques that would have been available had the question been, is there a presence of a particular gang in a given field office. We have not changed our basic structure. The standard remains the same to open a preliminary investigation.

Some have also raised concerns about the proper role of race or ethnicity in FBI investigations and intelligence gathering. Although difficult questions, these are not new questions. And we have not changed our approach in this area.

The balance struck by the Attorney General in the 2003 guidance on the use of race by federal law enforcement agencies remains in full force with the consolidated guidelines. At the end of the day, it is simply not feasible to eliminate race, ethnicity or even religion as a potential factor. Consider a suspect description that includes the perpetrator's race or an investigation of organizations such as the Aryan Brotherhood or the IRA.

But it is also the case that race, ethnicity and religion alone are not and should not be sufficient to open an investigation. The use of these factors is and should be a matter of serious discussion, and it has been throughout our process. After extensive consideration, we believe the balance was struck appropriately five years ago.

We've appreciated the opportunity to work with you and your staff and are grateful for the thoughtful comments we've received during our discussions. I appreciate the opportunity to be here today to continue that process. In response to your comments today and thus far, we anticipate making changes to the guidelines before they are finalized.

Mr. Chairman and members of the Committee, I look forward to your questions.

Chairman ROCKEFELLER. Thank you very much, Ms. Cook.
And now, Ms. Caproni.

**STATEMENT OF VALERIE CAPRONI, GENERAL COUNSEL,
FEDERAL BUREAU OF INVESTIGATION**

Ms. CAPRONI. Good afternoon, Chairman Rockefeller, Vice Chairman Bond and members of the Committee. I'm pleased to be here today.

We are here today to discuss the new Attorney General guidelines for domestic FBI operations, which are in the process of being finalized, which have been briefed to your staff and which Ms. Cook just discussed in some detail. With the help and input of this Committee, it is my hope that we can make these guidelines effective for agents and analysts operating in the field in the near term.

Approximately 18 months ago, the FBI asked the Department of Justice to consider combining three primary sets of guidelines that govern our investigations—the so-called general crimes guidelines, the national security investigative guidelines, or the NSIG, and the supplemental guidelines governing collection of foreign intelligence.

We asked them to combine them because we believe certain restrictions in the NSIG were interfering with our ability to become an intelligence-driven agency and that the differences were not supportable from a public policy perspective.

Finally from a compliance perspective, having different sets of rules to govern essentially identical conduct depending on how it is labeled is not ideal. To give you just a few examples of the inconsistencies, the guidelines governing national security investigations prohibited recruiting or tasking sources unless the FBI had a preliminary investigation or a PI open. There was no such prohibition in the general crimes guidelines.

The NSIG also prohibited physical surveillance other than casual observation without a PI opened. The difference between surveillance and casual observation was something close to a Jesuitical or Talmudic question.

The general crimes guidelines which governed other criminal investigations did not contain such a limitation. So, ironically, in many instances an agent could readily use physical surveillance to assess whether a particular location was being used for drug dealing but not for terrorist training.

In the past, these rules may have been sufficient for the threats they were intended to address. But criminal threat and national security threats do not fall neatly into separate categories. Different rules should not apply depending on how the agent decides to describe what he or she is investigating.

I must emphasize that despite the headlines of some newspaper articles, the new guidelines do not give the FBI any new authorities. Instead, they remove the last vestige of the metaphorical wall that has separated criminal and national security matters for years and has limited the use of certain authority that we have in the national security realm. They will replace several sets of guidelines with a single, uniform set of rules to govern the domestic activities of our employees.

The guidelines set consistent rules that apply across all operational programs, whether criminal or national security. They will give us the ability to be more proactive and to continue our transformation into an intelligence-driven national security and criminal organization. They will eliminate virtually all inconsistencies that present compliance challenges and that have confused our employees.

Several bipartisan commissions, the Congress and the American people have asked and expect the FBI to be able to answer questions such as, are there sleeper cells in this country planning attacks like those that occurred in London or Madrid. In order to answer those questions, the FBI must expand its intelligence collection beyond that which is collected as part of predicated investigations. We must examine threats in a proactive fashion and not simply rely on information that is provided to us in order to initiate action.

To achieve the mission of protecting the United States against terrorist and criminal threats, the Director is insisting that our employees think proactively about the threats and vulnerabilities in their areas of responsibility. Our employees are up to the task, but they need consistent, clear guidelines that do not vary based on

whether they're considering a threat from MS-13, Hizbollah or a foreign government.

The FBI has the responsibility of protecting the country from national security and criminal threats while upholding the Constitution. We will fail as an agency if we safeguard the country from terrorism but sacrifice the privacy and civil liberties that make us the country we are today.

We know that we can only achieve our mission of keeping the country safe if we maintain the trust and confidence of the American people. We understand that with these new guidelines comes the responsibility to ensure that the authorities granted are used responsibly and consistently with the best traditions of the FBI.

Mr. Chairman, I would like to conclude by thanking this Committee for the time your staff spent with us discussing the guidelines. As you know, historically the Attorney General has not brought Congress or outside groups into the process of drafting guidelines. Having the consultation process is new, and I believe it was extremely helpful.

We accepted many of the specific suggestions we received, and we have reconsidered certain provisions based on discussions with your staff as well as the advocacy groups. Although these are the Attorney General guidelines and they govern the FBI's activities, the truth is that everyone has an interest in making sure that we get the authority that we need to achieve our mission and that the authority comes with sufficient oversight and compliance mechanisms to ensure that the FBI does not achieve its mission at the cost of privacy and civil liberties.

I'm happy to answer any questions that you may have.

[The prepared statement of Ms. Cook and Ms. Caproni follows:]

PREPARED STATEMENT OF ELISEBETH COLLINS COOK, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE AND VALERIE CAPRONI, GENERAL COUNSEL, FEDERAL BUREAU OF INVESTIGATION

Mr. Chairman, Vice Chairman Bond, and Members of the Committee, thank you for the opportunity to appear before you today to discuss the Attorney General's Guidelines for Domestic FBI Operations. We believe that these guidelines will help the FBI continue its transformation from the pre-eminent law enforcement agency in the United States to a domestic intelligence agency that has a national security mission and law enforcement mission.

The new guidelines provide more uniform, clear, and straightforward rules for the FBI's operations. They are the culmination of prior efforts to revise the FBI's operating rules in the wake of the September 11 terrorist attacks. They are consistent with and help implement the recommendations of several distinguished panels for the FBI to coordinate national security and criminal investigation activities and to improve its intelligence collection and analytical capabilities.

These guidelines will protect privacy rights and civil liberties, will provide for meaningful oversight and compliance, and will be largely unclassified. Consequently, the public will have ready access in a single document to the basic body of operating rules for FBI activities within the United States. The guidelines will take the place of five existing sets of guidelines that separately address, among other matters, criminal investigations, national security investigations, and foreign intelligence collection. They are set to take effect on October 1, 2008.

We have greatly appreciated the interest of this Committee and others in these guidelines. Over the past six weeks, we have made a draft of the guidelines available for review to the Members and staff of this Committee, the House Permanent Select Committee on Intelligence, the Senate Judiciary Committee, and the House Judiciary Committee. We have provided briefings (and made the draft guidelines available for review) to a wide range of interested individuals and groups, including Congressional staff, public interest groups ranging from the American Civil Liberties Union (ACLU) to the Arab-American Anti-Discrimination Council (ADC) to

the Electronic Privacy Information Center (EPIC), and a broad set of press organizations. The dialogue between the Department and these individuals and groups has been, in our view, both unprecedented and very constructive. We have appreciated the opportunity to explain why we undertook this consolidation, and we are amending the draft guidelines to reflect feedback that we have received.

I. Purpose of the Consolidation Effort

Approximately 18 months ago, the FBI requested that the Attorney General consider combining three basic sets of guidelines—the General Crimes Guidelines, which were promulgated in 2002, the National Security Investigative Guidelines (NSIG), which were promulgated in 2003, and a set of guidelines that are called the Supplemental Foreign Intelligence Guidelines, which were promulgated in 2006.

This request was made for three primary reasons. First, the FBI believed that certain restrictions in the national security guidelines were actively interfering with its ability to do what we believe Congress, the 9/11 Commission, WMD Commission, and the President and the American people want the FBI to do, which is to become an intelligence-driven agency capable of anticipating and preventing terrorist and other criminal acts as well as investigating them after they are committed. The clear message to the FBI has been that it should not simply wait for things to fall on its doorstep; rather, it should proactively look for threats within the country, whether they are criminal threats, counterintelligence threats, or terrorism threats.

Second, the FBI believed that some of the distinctions between what an agent could do if investigating a federal crime and what an agent could do if investigating a threat to national security were illogical and inconsistent with sound public policy. Specifically, the FBI argued that there was not a good public policy rationale for (a) the differences that existed, and (b) the guidelines that governed national security matters to be more restrictive than those that governed criminal matters.

Third, the FBI concluded that having inconsistent sets of guidelines was problematic from a compliance standpoint. The FBI made its request for consolidation after the Inspector General had issued his report on the use of National Security Letters. That report helped crystallize for the FBI that it needed stronger and better internal controls, particularly to deal with activities on the national security side, as well as a robust compliance program. The FBI argued that, from a compliance standpoint, having agents subject to different rules and different standards depending on what label they gave a matter being investigated was very problematic. The FBI asserted that it would prefer one set of rules because compliance with a single set of rules could become, through training and experience, almost automatic.

The Department agreed with the merits of undertaking this consolidation project, and the result is the draft guidelines we are discussing today. These guidelines retain the same basic structure of predicated investigations on the one hand, and pre-investigative activity on the other—currently called threat assessments on the national security side and prompt and limited checking of leads on the criminal side. The standard for opening a preliminary investigation has not changed and will not change.

The most significant change reflected in the guidelines is the range of techniques that will now be available at the assessment level, regardless of whether the activity has as its purpose checking on potential criminal activity, examining a potential threat to national security, or collecting foreign intelligence in response to a requirement. Specifically, agents working under the general crimes guidelines have traditionally been permitted to recruit and task sources, engage in interviews of members of the public without a requirement to identify themselves as FBI agents and disclose the precise purpose of the interview, and engage in physical surveillance not requiring a court order. Agents working under the national security guidelines did not have those techniques at their disposal. We have eliminated this differential treatment in the consolidated guidelines. As discussed in more detail below, the consolidated guidelines also reflect a more comprehensive approach to oversight.

II. Uniform Standards

The guidelines provide uniform standards, to the extent possible, for all FBI investigative and intelligence gathering activities. They are designed to provide a single, consistent structure that applies regardless of whether the FBI is seeking information concerning federal crimes, threats to national security, foreign intelligence matters, or some combination thereof. The guidelines are the latest step in moving beyond a reactive model (where agents must wait to receive leads before acting) to a model that emphasizes the early detection, intervention, and prevention of terrorist attacks, intelligence threats, and criminal activities. The consolidated guidelines also reflect the FBI's status as a full-fledged intelligence agency and member of the U.S. Intelligence Community. To that end, they address the FBI's intelligence

collection and analysis functions more comprehensively. They also address the ways in which the FBI assists other agencies with responsibilities for national security and intelligence matters.

The issuance of these guidelines represents the culmination of the historical evolution of the FBI and the policies governing its domestic operations that has taken place since the September 11, 2001, terrorist attacks. In order to implement the decisions and directives of the President and the Attorney General, to respond to inquiries and enactments of Congress, and to incorporate the recommendations of national commissions, the FBI's functions needed to be expanded and better integrated to meet contemporary realities. For example, as the WMD Commission stated:

[C]ontinuing coordination . . . is necessary to optimize the FBI's performance in both national security and criminal investigations . . . [The] new reality requires first that the FBI and other agencies do a better job of gathering intelligence inside the United States, and second that we eliminate the remnants of the old "wall" between foreign intelligence and domestic law enforcement. Both tasks must be accomplished without sacrificing our domestic liberties and the rule of law, and both depend on building a very different FBI from the one we had on September 10, 2001. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 466, 452 (2005))

To satisfy these objectives, the FBI has reorganized and reoriented its programs and missions, and the guidelines for FBI operations have been extensively revised over the past several years. For example, the Attorney General issued revised versions of the principal guidelines governing the FBI's criminal investigation, national security investigation, and foreign intelligence collection activities successively in 2002, 2003, and 2006.

Despite these revisions, the principal directives of the Attorney General governing the FBI's conduct of criminal investigations, national security investigations, and foreign intelligence collection have persisted as separate documents that impose different standards and procedures for comparable activities. Significant differences exist among the rules these separate documents set for core FBI functions. For example, even though activities that violate federal criminal laws and activities that constitute threats to the national security oftentimes overlap considerably, FBI national security investigations have been governed by one set of rules and standards, while a different set of rules and standards has applied to the FBI's criminal investigations generally. These differences have created unfortunate situations where the same kind of activity may be permissible for a criminal investigation but may be prohibited for a national security investigation.

As an example of how the prior guidelines treated comparable activities differently based on how those activities were categorized, consider the question of what the FBI can do in public places. Under the multiple guidelines regime, the rules were different if the FBI received a tip that a building was connected to organized crime as opposed to a tip that the building was connected to a national security matter, such as international terrorist activity. The rules for how long the FBI could sit outside the building, or whether the FBI could follow someone exiting the building down the street, were different; specifically, more restrictive on the national security side and difficult to apply. It makes no sense that the FBI should be more constrained in investigating the gravest threats to the nation than it is in criminal investigations generally.

Similarly, under the prior guidelines, human sources—that is, "informants" or "assets"—could be tasked proactively to ascertain information about possible criminal activities. Those same sources, however, could not be proactively tasked to secure information about threats to national security, such as international terrorism, unless the FBI already had enough information to predicate a preliminary or full investigation.

The consolidated guidelines we are discussing today carry forward and complete this process of revising and improving the rules that apply to the FBI's operations within the United States. The new guidelines integrate and harmonize these standards. As a result, they provide the FBI and other affected Justice Department components with clearer, more consistent, and more accessible guidance for their activities by eliminating arbitrary differences in applicable standards and procedures dependent on the labeling of similar activities ("national security" versus "criminal law enforcement"). In addition, because these guidelines are almost entirely unclassified, they will make available to the public the basic body of rules for the FBI's domestic operations in a single public document.

III. Coordination and Information Sharing

In addition to the need to issue more consistent standards, the FBI's critical involvement in the national security area presents special needs for coordination and information sharing with other DOJ components and Federal agencies with national security responsibilities. Those components and agencies include the Department's National Security Division, other U.S. Intelligence Community agencies, the Department of Homeland Security, and relevant White House agencies and entities. In response to this need, the notification, consultation, and information-sharing provisions that were first adopted in the 2003 NSIG are perpetuated in the new guidelines.

IV. Intelligence Collection and Analysis

Additionally, the new guidelines carry out a significant area of reform by providing adequate standards, procedures, and authorities to reflect the FBI's character as a full-fledged domestic intelligence agency—with respect to both intelligence collection and intelligence analysis—and as a key participant in the U.S. Intelligence Community.

In relation to the collection of intelligence, legislative and administrative reforms expanded the FBI's foreign intelligence collection activities after the September 11, 2001, terrorist attacks. These expansions have reflected the FBI's role as the primary collector of intelligence within the United States—whether it is foreign intelligence or intelligence regarding criminal activities. Those reforms also reflect the recognized imperative that the United States' foreign intelligence collection activities inside the United States must be flexible, proactive, and efficient in order to protect the homeland and adequately inform the United States' crucial decisions in its dealings with the rest of the world. As the WMD Commission stated in its report:

The collection of information is the foundation of everything that the Intelligence Community does. While successful collection cannot ensure a good analytical product, the failure to collect information . . . turns analysis into guesswork. And as our review demonstrates, the Intelligence Community's human and technical intelligence collection agencies have collected far too little information on many of the issues we care about most. (Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction 351 (2005))

The new guidelines accordingly provide standards and procedures for the FBI's foreign intelligence collection activities that are designed to meet current needs and realities and to optimize the FBI's ability to discharge its foreign intelligence collection functions.

In addition, enhancing the FBI's intelligence analysis capabilities and functions has consistently been recognized as a key priority in the legislative and administrative reform efforts following the September 11, 2001, terrorist attacks. Both the Joint Inquiry into Intelligence Community Activities and the 9/11 Commission Report have encouraged the FBI to improve its analytical functions so that it may better "connect the dots."

[Counterterrorism] strategy should . . . encompass specific efforts to . . . enhance the depth and quality of domestic intelligence collection and analysis [T]he FBI should strengthen and improve its domestic [intelligence] capability as fully and expeditiously as possible by immediately instituting measures to . . . significantly improve strategic analytical capabilities (Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. Rep. No. 351 & H.R. Rep. No. 792, 107th Cong., 2d Sess. 4-7 (2002) (errata print).)

A "smart" government would integrate all sources of information to see the enemy as a whole. Integrated all-source analysis should also inform and shape strategies to collect more intelligence The importance of integrated, all-source analysis cannot be overstated. Without it, it is not possible to "connect the dots." (Final Report of the National Commission on Terrorist Attacks Upon the United States 401, 408 (2004))

The new guidelines accordingly incorporate more comprehensive and clear authorizations for the FBI to engage in intelligence analysis and planning, drawing on all lawful sources of information. The guidelines will allow the FBI to do a better job of being an intelligence-driven agency.

To be an intelligence-driven agency, the FBI needs to be asking questions. What is the threat within our environment? To give an example, without the new guidelines, if the question were asked of a Special Agent in Charge (SAC) of an FBI field office, "Do you have a problem of theft of high technology or theft of classified information within your domain?" the answer would be phrased in terms of how

many cases were open. But the number of cases open is a reflection only of what has already been brought to the FBI's attention; it is not an accurate measure of the true scope of a given risk.

The new guidelines will allow the FBI fundamentally to change who it approaches in answering the types of questions that we believe this Committee and the American people would like it to be answering. If a field office is seeking to assess whether it has a substantial threat within its area of responsibility of theft of classified or sensitive technology, it might begin the analytic work necessary to reach a conclusion by considering whether there are research universities in the area that are developing the next generation of sensitive technology or doing basic research that will contribute to such technology and considering whether there are significant defense contractors in the area. From there, the field office should compare those potential vulnerabilities with specific intelligence regarding the intentions of foreign entities to unlawfully obtain sensitive technology.

If an SAC determines that, within his or her area of responsibility, sensitive technology is being developed at a local university that is of interest to foreign powers, the SAC should then determine whether there are individuals within the field office's area of responsibility that pose a threat to acquire that technology unlawfully. In this example, a logical place to start would be to look at the student population to determine whether any are from or have connections to the foreign power that is seeking to obtain the sensitive technology.

Under existing guidelines, agents are essentially limited to working overtly to narrow the range of potential risks from the undoubtedly over-inclusive list of students with access. They can talk to existing human sources, and they can ask them: "Do you know anything about what's going on at the school? Do you know any of these students?" If the agent does not have any sources that know any of the students, then the assessment is essentially stopped from a human source perspective, because recruiting and tasking sources under the national security guidelines is prohibited unless a preliminary investigation is open. Similarly, the agent also cannot do a pretext interview without a preliminary investigation open, but the agent does not have enough information at that point to justify opening a preliminary investigation. An overt interview in the alternative may be fine in a wide range of scenarios, but could result in the end of an investigation by tipping off a potential subject of that investigation.

At the end of the day, the inability to use techniques such as recruiting and tasking of sources, or engaging in any type of interview other than an overt one, was inhibiting the FBI's ability to answer these types of intelligence-driven questions.

The ability to use a wider range of investigative techniques at the assessment stage, prior to the opening of a predicated investigation, is a critical component of the FBI's transformation into an intelligence-driven organization. Since 2003, we have had the ability to conduct threat assessments to answer questions such as whether we have vulnerabilities to or a problem with the theft of sensitive technology in a particular field office. With the new consolidated guidelines, the FBI will now have the tools it needs to ascertain the answer to those questions more efficiently and effectively.

V. Oversight and Privacy and Civil Liberties

The new guidelines take seriously the need to ensure compliance and provide for meaningful oversight to protect privacy rights and civil liberties. They reflect an approach to oversight and compliance that maintains existing oversight regimes that work and enhances those that need improvement.

As a result of the stand up of the National Security Division, and the reports by the Inspector General on the use of National Security Letters, the Department and the FBI have been engaged in extensive efforts to reexamine and improve our oversight and compliance efforts in the national security area. Our assessment has been that oversight in the criminal arena is provided through the close working relationship between FBI agents and Assistant U.S. Attorneys (AUSAs), as well as the oversight that comes naturally in an adversarial system for those investigations that ripen into prosecutions. Oversight on the national security side is different because of more limited AUSA involvement and because ultimate criminal prosecutions are less frequent in this area.

Traditionally, on the national security side, oversight was accomplished through two primary means: notice and reporting to then-Office of Intelligence Policy and Review, now a part of the National Security Division, and through filings with the FISA Court. We believe that conducting oversight in this manner was not as effective as the system set forth in the new guidelines. The prior oversight system was based primarily on reporting and generated many reports from the FBI to the De-

partment that did not provide meaningful insight into the FBI's national security investigations. Thus, the Department's oversight resources were not focused on those activities that should have been the highest priority—namely, those activities that affected U.S. persons. Moreover, to the extent that the process relied in part in filings with the FISA court for more in-depth oversight, it was under-inclusive. Many national security investigations proceed without ever seeking or obtaining an order from the FISA Court. The guidelines establish an approach to oversight that focuses the Department's oversight efforts on protecting the civil liberties and privacy rights of Americans in all national security investigations.

The new guidelines accomplish oversight on the national security side in a number of ways. The guidelines require notifications and reports by the FBI to the National Security Division concerning the initiation of national security investigations and foreign intelligence collection activities in various contexts. They also authorize the Assistant Attorney General for National Security to requisition additional reports and information concerning such activities. Additionally, many other Department components and officials are involved in ensuring that activities under the guidelines are carried out in a lawful, appropriate, and ethical manner, including the Justice Department's Office of Privacy and Civil Liberties and the FBI's Privacy and Civil Liberties Unit, Inspection Division, Office of General Counsel, and Office of Inspection and Compliance. A significant component of the oversight that will be provided by the National Security Division will come in the form of "National Security Reviews," which are the in-depth reviews of national security investigations that the National Security Division and the FBI's Office of General Counsel commenced following the Inspector General's report on National Security Letters in 2007.

Moreover, the new guidelines carry over substantial privacy and civil liberties protections from current investigative guidelines. They continue to prohibit the FBI from investigating or maintaining information on United States persons in order to monitor activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States. In connection with activities designed to collect foreign intelligence in response to Intelligence Community requirements, where the lawful activities of U.S. persons can be implicated, the guidelines require the FBI to operate openly and consensually with U.S. persons, if feasible. Additionally, as the Attorney General emphasized when he testified before the Senate Judiciary Committee, the guidelines prohibit practices (such as racial or ethnic "profiling") that are prohibited by the Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

The issue of how investigators may take race, ethnicity, or religion into account during an investigation is a difficult question, but it is not a new question. We have long recognized that it is not feasible to prohibit outright the consideration of race, ethnicity or religion—the description of a suspect may include the race of the perpetrator, and groups (such as Aryan Brotherhood, La Cosa Nostra, or the IRA) that are under investigation may have membership criteria that tie to race, ethnicity, or religion. But it is also the case that it cannot be, and should not be, permissible to open an investigation based only on an individual's perceived race, ethnicity, or religion. We believe that the balance struck in 2003 in this regard—reflected in the Attorney General's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies—is the appropriate one, and we have not changed that balance.

These guidelines continue to require notice to appropriate Department officials when investigations involve domestic public officials, political candidates, religious or political organizations, or the news media. Moreover, as a matter of FBI policy, the FBI imposes higher levels of approval on many activities that have an academic nexus, reflecting the American tradition of academic freedom in our institutions of higher learning.

Finally, these guidelines operate in conjunction with numerous privacy and civil liberties officials and components within the FBI and Department of Justice. As mentioned earlier, the vast majority of the new guidelines will be made available to the public, thereby providing the public with more ready access to the rules governing FBI activities within the United States. Before the consolidated guidelines take effect, the FBI will carry out comprehensive training to ensure that their personnel understand these new rules and will be ready to apply them in their operations. Indeed, this training is already underway. The FBI is also developing appropriate internal policies to implement and carry out the new guidelines. These policies cannot afford agents or supervisors more flexibility than the guidelines themselves but can, and in several cases do, set forth additional restrictions.

VI. Conclusion

Over the last seven years, the FBI has altered its organizational structure, and the Attorney General has issued new policies to guide the FBI as it seeks to protect the United States and its people from terrorism, intelligence threats, and crime, while continuing to protect the civil liberties and privacy of its citizens. The changes reflected in the new guidelines are necessary in order for the FBI to continue its important transformation to being an intelligence-driven organization. We believe that using intelligence as the strategic driver for the FBI's activities will improve its ability to carry out its national security, criminal law enforcement, and foreign intelligence missions.

Thank you again for the opportunity to discuss these issues with you, and we will be happy to answer any of your questions.

Chairman ROCKEFELLER. Thank you.

Ms. Cook, have the guidelines changed in any way since our staff was able to see them?

Ms. COOK. We have been discussing a number of changes internally in response to the very thoughtful suggestions that your staff has given us, that we have received from other staff as well and the outside groups that we had met with. We have not yet come to rest on final language, and there is not a new draft. It continues to be a work in progress. We would assume it would continue to be a work in progress after this hearing as well.

Chairman ROCKEFELLER. Were there some pretty basic areas involved? I mean, can you talk about the areas?

Ms. COOK. I'm happy to talk about some of the areas. One area that was brought to our attention during the briefing with members of this Committee, in particular, the staff, was how we had folded in the 1976 guidelines dealing with civil disorders and demonstrations.

We do anticipate revisiting some of the decisions that we made when we did fold those into the consolidated guidelines with respect to potential time limits on the investigation, the techniques that would be available, and ensuring that these types of investigations remain the narrowly focused types of investigations that they were always intended to be. That is one area where I think we would anticipate fairly significant changes from the draft that we had previously circulated.

Chairman ROCKEFELLER. The civil disorders referred to, are they any kind of civil disorders, or are they intelligence related or foreign related or somebody's been interviewed and didn't like what they were asked at pretext interview?

Ms. COOK. The 1976 guidelines on civil disorders and demonstrations covered essentially two types of activities. Civil disorders, the basic question is essentially whether or not you have a riot situation that is sufficiently dangerous that you should call in the federal troops. So the precise question that is being asked of the FBI is to gather intelligence to inform the President's decision as to whether or not to call in the troops. So that's the civil disorder side.

Chairman ROCKEFELLER. I understand. So that's intelligence relating to a non-intelligence event?

Ms. COOK. Exactly.

Chairman ROCKEFELLER. Right. Will the guidelines be released at some point? I mean, obviously if it's a work in progress you can't release them until they're done. What do you think the timeline will be on that?

Ms. COOK. We do hope to wrap this project up in the very near term. As Ms. Caproni indicated, this has been going on for about 18 months. But one of our goals in combining and consolidating the guidelines was to try and make them as public as possible.

Some of the guidelines that we were folding in and consolidating had been largely classified. And we believe that approximately 99 percent of the final set of consolidated guidelines will be not only unclassified, but publicly available.

Chairman ROCKEFELLER. I think that's a wise thing to do.

Ms. Caproni, if you would, describe the kind and extent of the physical surveillance that will now be allowed during threat assessments.

Ms. CAPRONI. It would be any sort of physical surveillance that doesn't involve intrusion into a constitutionally protected area. So it's surveillance that does not involve or doesn't implicate someone's reasonable expectation of privacy such that a warrant would be required.

So we could follow someone. We could follow a car. We could watch the outside of a building or a facility, anything that's public that you wouldn't need a warrant in order to do it.

Chairman ROCKEFELLER. Okay. Will the authority or this particular authority allow the FBI to follow a law-abiding U.S. citizen or a permanent resident all day or for many days without grounds to believe that the person followed is engaged in activities that endanger the national security?

Ms. CAPRONI. It could, but let me explain that further. We've imposed some structure on an assessment. So you have to open it, and you have to describe what you're doing, what's the purpose of it, what do you want to achieve. And that purpose has to be an authorized purpose. It has to be within FBI's mission.

So the description of what we're doing has to be provided to the supervisor for certain types of assessment. For limited checking of leads, there are slightly different rules. So the agent needs to describe what it is they're doing. In order to engage in surveillance, they need a supervisor's approval, and they need to, again, describe the purpose is of the surveillance. Is there a goal of the surveillance that is within the parameters of the assessment that they've described?

So it is conceivable that you would have someone who, for reasons that are sufficient to the assessment, we're trying to figure out whether there is a relationship between two people, because we have had some reason to believe that there might be and that there might be either a corrupt or an illegal relationship or that one or the other of them is an intelligence officer. There are lots of different reasons why you might need to engage in surveillance. And you want to know where the person lives, and you want to know where he works.

And so, you may well follow that person to ascertain where he lives and where he works. And that could be surveillance for a day. All of this would be, again, in non-privacy protected areas. So it's conceivable. It would depend on what the purpose is.

Chairman ROCKEFELLER. Thank you.

The Vice Chairman.

Vice Chairman BOND. Thank you very much, Mr. Chairman.

You know, Ms. Caproni, we've heard a lot of criticisms, as you might expect, that it's broad, new powers. But it seems to me the point is just to give the FBI a simple set of rules to follow in both criminal and national security investigations. Can you set the record straight directly on that point?

Ms. CAPRONI. Our goal in issuing a consolidated set of guidelines was to ensure that the FBI agents had a clear, consistent and rational set of guidelines to be following when they were doing investigations of potential crimes, threats to national security or intelligence gathering, foreign intelligence gathering. We thought it was important, not just for the agents, but also the American public to see that there was one set of clear and coherent rules.

We did also revisit the decisions that had been made in 2002 and 2003 to have different techniques available under general crimes guidelines as opposed to the national security guidelines. And based on our information as to how those guidelines worked out in the field, we determined that it no longer was rational to have those types of distinctions and, in fact, was impeding the FBI from becoming the intelligence-driven agency that we've asked them to become.

Vice Chairman BOND. Based on your former federal prosecutor experience, I guess that it makes sense. Should this not improve the FBI's ability to prevent and respond to national security threats?

Ms. CAPRONI. We believe that this will allow the FBI to take additional necessary steps to becoming a more proactive organization. One of the key issues that we think the FBI needs to be able to do is assess potential risks and vulnerabilities. Having these additional techniques available at the assessment level, we think, will be key to the FBI's ability to efficiently and effectively answer those questions and assess risks.

Vice Chairman BOND. Sounds reasonable.

Ms. Caproni, just to follow up and I think to state it positively with what you implied to the Chairman, if surveillance goes into an area where an individual has an expectation of privacy, will the FBI be required to get a warrant? And can you give us an example of that instance in which they would have to move from just the assessment indicating a warrant?

Ms. CAPRONI. Sure. Obviously the guidelines can't change the Constitution.

Vice Chairman BOND. Right.

Ms. CAPRONI. But if we're intruding into an area where there is a reasonable expectation of privacy, the agent either has to stop or they have to go get a warrant. A warrant is not—a search warrant is not an authorized technique for an assessment.

So if they're in a situation where something happens and they want a search warrant, they're, first off, going to need to open an investigation. They're going to have to show that they have sufficient reason or sufficient factual predicate that someone's either committing a crime or they're a terrorist or a spy in order to get supervisory approval to open an investigation.

If they don't have that, they're not going to be able to persuade a magistrate to give them a search warrant, because that requires probable cause. So they would need to take those steps.

An example might be: suppose there had been some reason to be concerned about what was happening at a particular storage locker. And so, the agents sit and watch the storage locker. And what they see is someone going in and out and taking fertilizer in and out of the storage locker.

That's probably enough, under the circumstances, assuming we're not in a farm area and it's not a logical place to store your fertilizer. There's a logical inference that that person is up to something. That would be enough to open an investigation, probably enough to get a search warrant, depending on what they want to do with the fertilizer. But they may want to substitute it for less volatile materials.

They would have to open an investigation and then go to a judge in order to get a warrant to do whatever it is they wanted to do relative to what was contained within the storage locker.

Vice Chairman BOND. Okay.

Ms. CAPRONI. But that would, again, be an example. If I might just go back to the Chairman's question where it could be that we got a bum tip on the storage locker and we're watching the storage locker and what we see is, in fact, someone who is engaged in perfectly lawful activity—putting the excess from his attic.

Vice Chairman BOND. Loading the fertilizer in his tractor spreader.

Ms. CAPRONI. Correct.

Vice Chairman BOND. That's different. Okay.

Ms. Cook, one final thing. What opportunity have the outside privacy national security groups had to offer any comments? Do you anticipate any changes based on comments from those groups or from Congress?

Ms. COOK. We have held a series of briefings over the last six weeks. We've held three formal briefings to staff up on the Hill. We then also had an extensive briefing session with numerous outside organizations, both civil rights groups and civil liberties and privacy organizations.

We have also made the guidelines available upon request to Members and Committee staff. This has been a six-week process. We do anticipate making changes in response to the comments that we have received.

Vice Chairman BOND. Thank you very much, Ms. Caproni and Ms. Cook.

Chairman ROCKEFELLER. Thank you, Mr. Vice Chairman.

Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman.

I thank our witnesses. And once again, our Committee is back at the intersection where you're talking about how you fight terrorism ferociously and at the same time be sensitive to the rights of our citizens.

And my principal reason for concern here, not the two of you, is the agency's troubled history in implementing new investigative authorities, and particularly you see this most recently with the national security letters, which is a very clear example of where the agency was given new powers. There wasn't adequate guidance. There wasn't adequate internal oversight. And the problems have now been well-documented. So what I'm interested in is getting at

a couple more of these concrete examples so I get a sense of exactly how this is going to work.

And I'm going to start with you, Ms. Cook and your colleague as well just to give me some insight into how this will work.

If you have an FBI agent, for example, who's looking at various intelligence matters and wants to know which employees at a particular shoe company are traveling to which foreign country, you've got a situation where there's no ongoing investigation, no tips, no information, nothing whatsoever, that the company or the employees are engaged in or tied to any kind of dangerous, illegal activity. If the agent goes to the company's headquarters to ask about employee travel habits, under the proposed guidelines, can the agent who's making the inquiry mislead in any way, in other words, say that they're not with the government, something that involves false pretenses?

Ms. COOK. What the consolidated guidelines do is harmonize the two previous standards that you had. Under general crimes guideline, in your scenario if the question was is the company involved in drug trafficking, then an agent could go to the company and ask questions without affirmatively revealing themselves as an FBI agent or the precise purpose of the visit. We have now harmonized that. And if the question instead is are there employees who are related to a threat to the national security, yes, the FBI agent would have the option of choosing not to identify themselves as an FBI agent or, in the alternative, not to identify the precise reason for the request for information.

Senator WYDEN. Okay. I understand fully your argument with respect to convergence. And these are issues that reasonable people can differ on. But what you have identified for me is that in the intelligence gathering area, the agency would be given new powers, A, and be given them in instances where there was not the traditional predicate, where there wasn't the tips and the information. And that really gets me to my last point because you have basically clarified for me the new powers.

Exactly how is the process of putting in place the controls on this going to go forward? You're going to continue the discussions, I think you said, with the various public interest groups. And that certainly is constructive. And then what will happen after that?

You said you wanted to take into consideration what they say and what we say. And again, kudos to you for that. But what happens in terms of putting in place the kind of internal controls so that four or five months after something like this goes into effect, if it does, that you don't have the same problems you had with the national security letters?

Ms. COOK. We are trying to wrap up the guidelines and finalize the guidelines in the very near term. But the guidelines provide a framework for the FBI. And what you have on top of the guidelines are FBI policies that will implement the guidelines' provisions themselves. And it's a one-way ratchet.

The policies can only be more restrictive than the guidelines themselves. They cannot be more permissive than the guidelines. And the policies are binding upon the FBI agents.

We are continuing to develop those policies. There are folks hard at work, I'm guessing right now, at the FBI working on those poli-

cies. As the Director testified last week, we would hope to make those policies, to the extent that we can, public as well.

Senator WYDEN. Thank you, Mr. Chairman.

Chairman ROCKEFELLER. Thank you, Senator Wyden.

Senator Whitehouse.

Senator WHITEHOUSE. You all have explained how the FBI would connect the purpose of the investigations. Ms. Caproni, I think you were the one who described how you would have to establish that there is a purpose of the investigation that falls within the jurisdictional guidelines that gives the FBI a role. Correct?

Okay, so we have the purpose. And you've vet that against the FBI's jurisdiction. That's a fairly simple legal determination. And now let's say that it's a go, and you have an investigation pursuant to that purpose.

Now, you have to take humans, subjects of that investigation, and you have to connect them to that purpose. Correct? It's not enough just that you have the purpose to defend national security. If you're going to go out and surveil somebody or take some investigative action, there has to be some nexus between that individual and the purpose that you seek to achieve. Correct?

Ms. CAPRONI. Correct. Although I think you've sort of jumped several steps in terms of analytically how it would happen. But yes, if we get down to the point that we're looking at particular people, you have to have some connection between the people and your purpose.

Senator WHITEHOUSE. Well, take me through some of those analytical steps that would connect a person to a purpose and authorize an FBI agent to investigate some aspect of their lives.

Ms. CAPRONI. Or assess, we would say, at this point because—I'm interpreting your question as being—

Senator WHITEHOUSE. It's not going to feel much different to the person on the other end. So use the word you please.

Ms. CAPRONI. Okay. Let's say that the question is, that the question that's been posed is, do you have an MS-13 presence in your area of responsibility. So the question is, is MS-13 here or not. So the agents and the analysts are going to need to do a lot of work in order to answer that question.

Historically the answer to that question would be we have two MS-13 cases or we have no MS-13 cases or we have 100 MS-13 cases. So if they have 100 MS-13 cases, big problem. No cases, no problem. Two cases, small problems. But that's not true because what all cases reflect is what we know, what's come in the door.

Senator WHITEHOUSE. So the first cut in the analysis is organizational. Is an organization that is working against the purpose that you seek to achieve and that you've identified operating in this area?

Ms. CAPRONI. Correct. So then what we need to do is look at MS-13 and say what does MS-13 look like. How would we know if it's in our territory or not? So cutting through a lot—

Senator WHITEHOUSE. Let's say you've established that. Let's move on to the next step.

Ms. CAPRONI. Okay, but that's an important—if I could take just a second. So let's say that what we know is that MS-13 is associated with several things.

Senator WHITEHOUSE. I have less than a minute and 53 seconds left, just so you know.

Ms. CAPRONI. Okay. First off, they're almost all Central Americans, ex-pats. Second, there are certain graffiti tags that are associated with an MS-13 presence. Third, there may be certain tattoos that are associated with MS-13. They're very specific to MS-13. Fourth, there may be certain criminal conduct that MS-13 is particularly engaged in. So you start looking at all that.

Senator WHITEHOUSE. For a nexus between the individual and the organization?

Ms. CAPRONI. Correct.

Senator WHITEHOUSE. But you can't include racial—

Ms. CAPRONI. But first you're looking at people who are potentially—that is, they bear the characteristics that MS-13 does.

Senator WHITEHOUSE. Yes.

Ms. CAPRONI. So you've got graffiti that's associated with them. You've got tattoos that are associated with them. You've got criminal conduct that's associated with them. You've got Central Americans who are engaged in this conduct. So you've got a potential for MS-13 presence based on what you've heard.

Senator WHITEHOUSE. Yes.

Ms. CAPRONI. You may at that point start talking to informants. What do you know about these people? Are they MS-13?

And so, then you start to narrow down and start to look at, well, do you have an MS-13 presence or not. And that may lead you to say between informant information and other information, police information and the like, you've got some people here that look like they may be MS-13.

Senator WHITEHOUSE. And have you got language at this point that describes the nexus that you would require between the individual and the organization in the same way that, you know, in a search warrant context one would use the phrase probable cause or in an undercover investigation into public corruption you'd look for predication? What would be the legal terminology or the sort of overall description of what you would require in order for that nexus to be signed off on by the supervisory agent?

Ms. CAPRONI. Again, that is for us to take an investigative—to take assessment activities relative to a particular individual?

Senator WHITEHOUSE. Yes. What would the benchmark be they'd have to meet in the simplest possible terms?

Chairman ROCKEFELLER. Senator Whitehouse, don't worry about time. I'm yielding my time to you.

Senator WHITEHOUSE. Well, thank you, sir.

Chairman ROCKEFELLER. So go at it.

Ms. CAPRONI. The way we describe it is in terms of fit. So we talk about what is the fit between the intelligence that you have and the persons that you are looking at. The closer to fit, the more likely and more logical it is to approve activity. But even with that, you always need to look at what's the intrusion level of the activity.

So to go back to Senator Wyden's question—I realize he's not here, but hopefully someone will pass it along—on the questions of whether you can use a pretext interview to go talk to a particular manufacturer, I would have added to the answer. It would depend. Because the question is, is that the least intrusive means of getting

to the information that you need. You're dealing here with an American company. You're dealing with Americans.

To the extent possible, you should be, if you're looking for purely foreign intelligence—it wasn't clear from the hypothetical what we were looking for—you need to operate openly and consensually. Even if you're looking for counterterrorism, counterintelligence or criminal information, you've still got to be bound by what's the least intrusive alternative.

Going to a public company that we have no reason to believe is engaged in any wrongdoing and engaging in a pretext interview is a very intrusive step. Why does the FBI need to engage in pretext there?

Senator WHITEHOUSE. I think what I'm hearing is that there's kind of a sliding scale between the fit that is required of the subject of the assessment to the investigation and the technique that you are authorized to use against the person. Is that correct?

Ms. CAPRONI. That's one of the factors that's looked at when analyzing under least intrusive alternatives.

Senator WHITEHOUSE. So when you said that you could—in the answer to the Chairman's question—that you could use any technique up to and anything short of what would require a warrant, that would also presumably include a pen register?

Ms. CAPRONI. No, no, no, that's not what I said. The Chairman's question had to do with whether we could follow someone.

Senator WHITEHOUSE. Yes.

Ms. CAPRONI. And what's the limit of surveillance—

Senator WHITEHOUSE. You said you could follow them wherever you didn't need a search warrant to follow them.

Ms. CAPRONI. We were talking about physical surveillance, just watching someone. A pen register is not physical surveillance. That requires a court order, and it requires at least a preliminary investigation to be opened before you can do that.

Senator WHITEHOUSE. I understand that.

Ms. CAPRONI. Because you need—there's a required showing to a court there. But just for physical surveillance, the limit to physical surveillance is I can sit and watch anything or I can follow anything so long as I'm not intruding into a Fourth Amendment area. But whether that's proper still has to be evaluated under the least intrusive alternative. So following someone around all the time can be intrusive. It depends on what—again, it all comes back to what are you looking for.

Senator WHITEHOUSE. Yes. Well, let me—again, even though the Chairman's been generous with my time, I really need to try to focus on my questions if I'm going to get through this. So let's talk just for a moment about the pen register and the trap and trace, which obviously prosecutors need an order, but they don't need probable cause.

Ms. CAPRONI. Correct.

Senator WHITEHOUSE. It's a very, very low threshold, basically relevant to an investigation there.

Ms. CAPRONI. Correct.

Senator WHITEHOUSE. It's not uncommon to see them referred to basically as a wiretap subpoena just because you get the paperwork and you go to the phone company, you get the stuff. If you've got

an individual—let's put it this way. How much fit is required for you to get up on a pen register, trap and trace on an individual?

Ms. CAPRONI. Well, you need at least a preliminary investigation opened. So you've got to at least have information or allegations.

Senator WHITEHOUSE. Let me cut to that, then, because that's another way of cutting at this. You've got a criminal case going on, you know. When you know the crime, you open the case, and then you can investigate under the authority of that open case.

Ms. CAPRONI. Right. Correct.

Senator WHITEHOUSE. In this matter, it strikes me that the open case is essentially the organization. You don't open a case for terrorism in this district. You open a case for—

Ms. CAPRONI. We've got a misunderstanding here.

Senator WHITEHOUSE [continuing]. MS-13?

Ms. CAPRONI. The area where these guidelines are changing things is in the assessment area. You cannot use a pen register during an assessment.

Senator WHITEHOUSE. Period.

Ms. CAPRONI. Period, end.

Senator WHITEHOUSE. Okay.

Ms. CAPRONI. Not available.

Senator WHITEHOUSE. So you can't use it.

Ms. CAPRONI. No way, no how.

Senator WHITEHOUSE. When do you open a case in this area?

Ms. CAPRONI. Well, if you have information or allegation that the person is or may be one of those things, either criminal or a terrorist—

Senator WHITEHOUSE. You have organization, fit and purpose.

Ms. CAPRONI. No, no, no, no, it's a specific. To get to a preliminary investigation, you have to have a specific factual predicate. It's the same factual predicate you've always had to have. So information or allegation of criminality or a threat to the national security.

Senator WHITEHOUSE. All right.

Ms. CAPRONI. The assessment, though, is the one step before that. And you can't use a pen register then.

Senator WHITEHOUSE. Okay. That's helpful to know.

Thank you, Mr. Chairman. I appreciate the indulgence of the extra time.

Chairman ROCKEFELLER. I think the Vice Chairman was about to yield his time to you also, which he could do in that he's about to leave. And that would give you—

Vice Chairman BOND. Would you like another half-hour?

Chairman ROCKEFELLER. No, come on, Sheldon. You're on.

Senator WHITEHOUSE. How about billing records and payment information?

Ms. CAPRONI. You can't get that in an assessment. You can only get that in a preliminary investigation.

Senator WHITEHOUSE. Okay.

Ms. CAPRONI. Well, let me clarify that slightly. Are you talking about billing records and payment records for telephones?

Senator WHITEHOUSE. For telephone calls.

Ms. CAPRONI. Yes, you need at least a preliminary investigation open.

Senator WHITEHOUSE. Okay. That was it. Those are my questions.

Chairman ROCKEFELLER. All of that breach of protocol and that's all I get for it?

Senator WHITEHOUSE. Yes, I know. Sorry.

Chairman ROCKEFELLER. Okay, Ms. Caproni, pretext interview. There are some questions in pretext interviews designed to obtain information potentially by instilling fear in a person or false grounds in a person interviewed. Can that happen? And, if so, do you know of an example?

Ms. CAPRONI. Is your question, can that happen during an assessment or can that happen during a pretext interview?

Chairman ROCKEFELLER. Pretext interview.

Ms. CAPRONI. Yes, it could happen during a pretext interview.

Chairman ROCKEFELLER. And you would use that specifically motivated by what desire?

Ms. CAPRONI. Okay, now the question comes what is FBI policy. And FBI policy is—though it's not entirely set—is looking very carefully at the circumstances under which the pretext is something that, to use your words, instills fear or for whatever reason motivates someone to talk to the agent who might not otherwise, who might say go away and leave me alone. So we're looking as a matter of policy at how to define that.

There have never been any restrictions on the criminal side in terms of what sort of pretext can be used to get someone to talk, including a pretext that is entirely designed to strike fear in the heart of the person that the agent approaches. But we're looking very carefully at that because, depending on how it's used, again, it's not a least intrusive alternative. It is a fairly intrusive alternatively, in fact. And so, we're trying to set policy around pretext, something that we, frankly, again, have never done.

Chairman ROCKEFELLER. So it's something that you really get to a point that it's something which can have value, but also causes concern?

Ms. CAPRONI. Correct.

Chairman ROCKEFELLER. And how, therefore, do you surround it with some envelope of protection and propriety?

Ms. CAPRONI. Correct.

Chairman ROCKEFELLER. And what you can say is you're working on it?

Ms. CAPRONI. I'll say I'm working on it. And I'll also say, as the Director indicated during the course of testimony and I think we've told your staff as well, once we get the policy further along so that some of these things that we're debating internally have at least somewhat come to rest, we are happy to come up and brief your staff and would love the opportunity to talk to them about where we've drawn those lines.

Ms. COOK. If I could add very quickly?

Chairman ROCKEFELLER. Please.

Ms. COOK. One effect, we think, of the change in our approach to oversight would also be to add additional main Justice oversight to precisely these types of questions. Historically on the national security side oversight was accomplished through notices. So if a preliminary investigation was opened or a preliminary investiga-

tion was renewed, there would be a notice that was given to attorneys in the now national security division.

Or, if agents wanted to avail themselves of FISA tools, they would have to go through main Justice attorneys to do so. That would not cover assessments. So you have this area where the FBI had a fair amount of latitude, and we did not have a structured or routinized approach to oversight.

With the on-site audits that we have instituted and are reflected in the guidelines, those will encompass exactly these types of decisions and the assessment category. So the assessment level, we think, at the end of the day is going to be subject to more main Justice oversight than it historically has been.

Chairman ROCKEFELLER. Different subject. Right after 9/11 we had to pass this ridiculous but crucial law saying that the CIA and the FBI could talk to each other. And that was, in fact, a national embarrassment, but thank heavens, we did it.

There was then a period of time where there really wasn't much movement on either side. And I don't necessarily mean that Bob Mueller and whoever the director was at that time of the CIA weren't willing to go back and forth. But as you went down the ranks a little bit, the resistance built in.

Now, I'm not a lawyer, unlike my friend, the Supreme Court judge over here. But the thing I always keep in my mind is the long, yellow pad. And the FBI agent, law school graduate is trained on that. And there are slurs, tons, thousands of agents across this country.

And then, incidentally, you have agents which are their own fiefdoms—I mean, you know, agencies which are their own fiefdoms. They don't necessarily report everything in. Coleen Crowley could tell you something about that.

But they're trained to do what they do. People in their 30s, maybe even late 20s, 40s who have been charged with the idea of arresting somebody, as they did Moussaoui—great mistake—tend to continue to do that so that you can have intellectually and willfully in the very top echelons of the FBI a determination to combine, as indeed you are here, as you combine five things into one, even more so you're taking a bifurcated FBI agent and making him into a single source of success on both intelligence and criminal arrests.

There's a great part of me—and I then go to my next favorite agency, which used to be called HCFA, where they have more people working than the United States government has and they have piles and piles and piles and piles of paper, no windows. And they're accustomed to doing things in certain ways. A pile comes off the top, you know, the first piece comes off the top. They do it, and on they go, and on they go. And it builds in habits. It's true. It's human nature. It's true in all of us.

Now, I want both of you to give me comfort that this making one, not just of the guidelines or other guidelines, which is symbolic, in a sense, of making one of the agent, to both do when appropriate the criminal and to do the intelligence. It takes eight years to make a good intelligence agent. I don't know if that's true internally as much as it is external to this country, but let's just say that.

Talk to me about that. And give me some comfort on that. I worry about that—that the idea is great, that the intention is great, that the leadership is great, but that down the line five or six or seven rungs, you know, getting it to the UBL unit or whatever it is just doesn't happen.

Ms. CAPRONI. I completely understand your question. And I'll say that if the only thing we had on this was the new agent guidelines my answer would be it's not going to happen. The guidelines alone is not the answer.

The guidelines are part of the answer. The other part of the answer is what are you measuring, what are you grading, what are you counting. And a lot of what's happened—and I'm pretty sure this Committee has been briefed on what we are calling the SET process, which is very much a process that is designed around continuing the transformation into us being an intelligence-driven agency so that there's a constant FIG structure so that the people who are running the field intelligence groups are able to ask questions and the questions they ask, again, are intelligence-driven questions.

So the hypothetical that I posed is do you have an MS-13 presence. That's a real question. That's a real question that our SACs have been asked. Do you have an MS-13 presence? And when they come in to the meetings to discuss this and they say, well, we have two cases, what they're told is, that's not an answer.

What we want to know is what have you looked at. You know, who's in your community? What are they doing in your community? How have you answered the question, no, I don't have an MS-13 problem?

And ideally what we want to hear is, I don't have an MS-13 problem, but I've got a big Bloods and Crips problem that I've got to deal with, or I don't have either of these sorts of problems. What I have is sort of random street crime, and I really need to get on to the task forces with my local police because that's what's affecting the community here—street crime that's not federal but that we can provide assistance to.

All of those are really intelligence-driven questions and answers that, I think, frankly, the FBI—and they're my client, I love them—but they tended to answer questions in terms of cases. And cases are a very bad way of answering questions because that's simply a reflection of what's come to us as opposed to what we've looked hard and analytically at.

I think people think we do a lot more analytic work to say, yes, we have in this community a problem with counterintelligence. We've got the right sort of institutions in our area so that we've got a financial fraud problem. But I think the reality is, if you've got a go-get-'em squad for financial fraud, you've got a bunch of financial fraud cases. If you've got a go-get-'em Chinese squad, you've got a bunch of Chinese counterintelligence cases. And if you don't, you won't.

What we want to say is that's not the right way to allocate resources. We want to know what are your threats, what are your vulnerabilities. And in order to get to those, this is really being driven from the top, from the Director, and it's being driven

through the Directorate of Intelligence where people have to answer these questions.

And if they don't answer them, they're not doing well on their performance evaluations. They're not doing well on their bonuses, all of which affect the willingness for change in the bureaucracy that you're talking about among people who came up through the criminal system.

What they want to do and, by God, what they were trained to do, is put handcuffs on. Those people have been driven to if I want to perform and I want to do well in this organization, I have to think from an intelligence-driven perspective. I have to be willing to answer those questions, not just solve my case.

And so, I think the answer is the guidelines alone aren't enough. But the guidelines are the way with this other activity that's going on through the SET process that the FBI will get to where we need to get.

Chairman ROCKEFELLER. I won't go on much more. But is the fiefdom nature—and that's the pejorative and I understand that and apologize. But the CIA operates as one. Everybody reports one way or another up to the top. That's not true in the FBI. And if you were trying to de-bifurcate somebody, to make them two different entities at the same time, I can't make a direct comparison between that and individual jurisdiction and I don't have to report to anybody, you know, I'm my own—I'm in charge of my own little fiefdom.

There's something there which is troubling. And if it should not be troubling to me, I want you to tell me why. Is there any consideration of taking a very old system of that sort, given a new responsibility that is intelligence in a variety of ways and adjusting that system?

Ms. CAPRONI. I think that actually there has been a lot of adjustment. And somebody who was an SAC in 2000 would not recognize the job of an SAC now, so that the autonomy that the SAC used to have—I mean, my example is they were the princes and princesses of their territory. They were in charge of the territory, and they were in charge of their office.

That really isn't the case anymore. A lot of stuff is headquarters-driven; the entire counterterrorism program is directed really from headquarters. The counterintelligence program has always really been headquarters-directed anyway. The final piece is really this intelligence-driven piece.

So the intelligence program is very much a headquarters to the field. So requirements start at headquarters and they go to the field.

The SAC may not be interested in the particular requirement. Whether he or she is interested or not, that requirement has to be answered. And so, the direction from the headquarters down into the field, while it's not the same model as CIA, but what it's achieving is very much a national program which goes down through the field offices. So that SAC, they have some autonomy, but they don't have the same level of autonomy they had 10 years ago. And they've got to respond to these intelligence requirements from headquarters.

And so, I think that the concern that you're articulating was—you know, three years ago, four years ago I'm not sure I could have said we were there. I think now we're getting closer.

And I would really—I mean, I think it sounds to me like—I don't know when you all were last briefed on SET, but it seems to me that that would be a valuable thing for the people who are running this program and can really explain much better than I can exactly how it works to come up and talk to you. Because I think they've done a remarkable job of really breaking down that wall that you're talking about, the internal wall of people and saying to the SACs, you are part of a national system and you've got responsibilities nationwide.

You've got information within your area that we need elsewhere. And you can't just hold onto it in your little office thinking that you've done your job. If that's all you've done, if you've collected the information and it's sitting in your files in Kansas or Paducah or Louisville, you have not achieved your mission. You haven't done your job. You've got to report it out so that other people who need this information can use it.

Chairman ROCKEFELLER. In the CIA obviously there are some things which go to the top right away simply because there are different forms of collecting it and they come in quickly. But for the most part, it's some agent out somewhere in some country who is either by himself or with a small team and they come up with connections or facts or whatever that are interesting. And the CIA leadership knows nothing about them. They're told about them. They're told about them.

To me that's sort of the essence of intelligence. Now, that may already be becoming old fashioned the better our listening and all the rest of it gets. But I don't think so. So I want you to help me understand that with respect to the FBI. The CIA tends to be from the ground up. Yours sounds like it's from the top down.

Ms. CAPRONI. The requirements are from the top down. But the requirements can also go from the bottom up. So if an agent sees in a case that there are links being made, they're seeing connections—and the classic example would be the Phoenix memo.

So an agent just happens to notice that there are Middle-Easterners taking flight lessons and it seems odd. What that would now do is, rather than him writing a memo and it going to headquarters and people kind of shrugging their shoulders and saying I don't know what we're going to do about that, instead the agent can propose a requirement.

They can propose that what the agent in Phoenix thinks is odd would then be considered to be a requirement. So it would go out as an intelligence report that this is what I'm seeing. If headquarters says yes, we agree, that is sufficiently odd, we want to know if that's going on elsewhere, they can push that requirement down.

So instead of just having one agent in one office thinking, gosh, this is odd, instead we're going to say to all agents, we want you to go talk to your flight schools. Are you seeing people taking flight lessons that seem odd, that something's wrong here? And, you know, you can change the facts in a lot of different ways, crop dusting or whatever.

But there's something odd going on here. So we expect, just as we expect from the top to be able to say we need to know this information from a nationwide perspective, we also expect agents to have the initiative to say I'm seeing something unusual in my area either because I am on the FIG and I'm collecting intelligence and I've got a lot of human assets out there who are telling me these things or because I'm working a criminal case and I see through my criminal case an odd connection that I've never noticed before that, you know, these durable medical equipment sellers are dealing with organized crime. I've never seen that before. Are you seeing it elsewhere?

And then that would get pushed out, and it would become a requirement. So I think our model is not unlike the CIA, where there are both things from the top that go down and there are things from the bottom that go up.

Chairman ROCKEFELLER. Okay. Good.

Senator Feingold?

Senator FEINGOLD. Mr. Chairman, first let me apologize. I certainly was not playing hooky. We were voting on the India nuclear deal. So I do apologize for just getting here now.

Ms. Cook, you said the guidelines are not final, but you hope they will be in the near term. Do you still plan to implement them by October 1st, as was indicated in the DOJ letter last month to Senators Leahy and Specter? And are FBI agents already being trained on the new guidelines? And if so, how does that work when the guidelines are not yet final?

Ms. COOK. The October 1 deadline is obviously a deadline we're going to have to reevaluate in terms of implementation, given the fact that we are making changes based on the discussions that we've had over the last six weeks with Committee and outside groups. Ms. Caproni can go into more detail as to the level of training that has already been under way.

There has been some training and extensive development of policies. But you're correct. It cannot be completed, and the policies cannot be completed until the guidelines are finalized.

Senator FEINGOLD. So it's not likely to be implemented by October 1st?

Ms. COOK. I think we're going to have to reevaluate the October 1 deadline.

Senator FEINGOLD. Okay.

Ms. Caproni, you testified in March 2007 that in contrast to criminal cases, which are transparent and where agents' activities are subject to the scrutiny of a judge, the national security side occurs largely without that level of transparency. You described this as a concern and testified that that imposes upon us a higher obligation to make sure that we have a vigorous compliance system, that we have in place the training that is necessary, that we'll retrain the agents, so that when agents are working in this area we'll make sure they know. Do you agree that there is a greater possibility for abuse in the national security area?

Ms. CAPRONI. I'm not sure that I would say there's a greater possibility of abuse. I would say there's not the same level—there's not the same public oversight as there is in criminal cases. But I think since then there have been several changes, specifically the level of

oversight that's coming from the oversight section of the national security division now that it's stood up.

After that, we, the FBI, instituted what is, as far as I know, the first government compliance office. Their purpose is to look at our policies, look at what's going on and make sure that cooked into our policies are appropriate procedures to self-regulate and that there are procedures in place to come back around the other side to say, well, are they working. It's nice to have a great policy that seems to work, but you need some sort of an audit function so that you come back around and make sure that it actually is working.

So we're working with the Department. And I think from the national security side what we've tried to substitute for the kind of oversight that comes with an AUSA in a criminal case are the national security reviews and other oversight that the national security division is giving to activities that take place at the FBI on the national security side.

Senator FEINGOLD. I appreciate those efforts, but I just want to highlight the inherent difference between national security cases and criminal cases. You've alluded to the lack of transparency and judicial oversight not being available.

Ms. Caproni, in January 2007, at an open Intelligence Committee hearing I asked FBI Director Pistole about the FBI's domain management program, which he described as including the collection of information about various community "constituencies" across the country. In fact, he specifically mentioned Dearborn, Michigan, which, of course, has a large Arab-American and Muslim community.

Deputy Director Pistole assured me, however, that "we would not be collecting any information in the first place unless there was some predication for doing that." Under the new guidelines is that still accurate?

Ms. CAPRONI. I would say that perhaps a better way of phrasing that answer now under the new guidelines is they would only be collecting information if there is an authorized purpose. So within an assessment you could collect information on various constituencies. But it's got to be linked back to what's the purpose of the assessment. It's got to be legitimately within the parameters of an assessment.

Senator FEINGOLD. Well, it strikes me that a purpose and a predicate are different, very different. A predicate means to me there's some reason to think we ought to be looking at these people as opposed to simply we'd like to do it.

Ms. CAPRONI. I don't want to quibble over words. When we use the word "predication," we typically are talking about a predicated investigation which has historically since the time of the Levy guidelines had a very specific meaning. We wouldn't be collecting information on anyone unless there is a purpose, unless there is a predicate, small p, predicate.

Senator FEINGOLD. Well, what is the meaning of predicate? What is the traditional meaning of predicate then?

Ms. CAPRONI. Typically that you have some reason to believe a particular person has engaged in either criminal conduct or a national security threat.

Senator FEINGOLD. But you're telling me that a purpose can be sufficient without a predicate apparently.

Ms. CAPRONI. Again, I'm concerned about the semantics, and I don't want to get into that because, again, if we're trying to be intelligence-driven and the question is, do you have a particular threat in your environment, the threat is to some extent the predication. That is, we know that certain foreign governments are trying to steal our secrets. The question is where.

So where within the United States is the foreign government actually focusing on our secrets? So we've got a predicate because we've got a threat. The threat is that our secrets are being stolen. Do we have a particular person—

Senator FEINGOLD. I've got to say that doesn't satisfy my understanding what a predicate should be in a situation like this. Under that rationale, that purpose can become a justification for rooting around into the personal lives of everybody in Dearborn, Michigan who might be of that background.

Ms. CAPRONI. I disagree.

Senator FEINGOLD. Well, that's my concern. And I do want to get into semantics because to me there's a world of difference between those words.

Ms. CAPRONI. I don't think it gives you the right to root around in everyone in Dearborn, Michigan, because, in fact, if our intelligence brings us no better than expatriate Saudis, then we've got nothing. There's no basis to proceed because the fit—we talked a little bit about that with Senator Whitehouse—the fit between what you're looking for, the threat, and who you're looking at is too loose.

Because while some people within that community may pose a threat, mostly they don't. So you don't have a good fit. You've got to do more work to get your universe down closer to the threat.

But all we're saying, Senator, is if you want us to be able to answer the question, do you have this threat or do you have this problem in your environment, if you limit us to starting with someone that we know poses the threat, we are missing the threat. We know the threat exists, but we don't know who within the environment poses the threat. So we've got to have some way to close that gap.

What we think is these guidelines, with appropriate policy, permit us to close that gap but always being respectful that you have to use the least intrusive alternative, and you can't investigate someone or focus on someone solely because of First Amendment activities, race or ethnicity. There has to be something more.

And, again, from a policy level what we're going to be training on is—and you need a good fit. It doesn't necessarily have to be a perfect fit because it's not always going to be perfect. We're not always going to be that good. But if it's no better than all your expat Saudis in Dearborn, you've got nothing.

Senator FEINGOLD. I'm trying not to take away too much time, but this is a very important discussion about, you know, the difference between all the ex-pat Saudis and then somebody that you have a very specific information on. That in-between area is terribly important, not only in terms of posing the threat, but also in

terms of the rights of people that aren't doing anything wrong. But I appreciate the conversation.

Thank you, Mr. Chairman.

Chairman ROCKEFELLER. Do you want to continue?

Senator FEINGOLD. No, I'm fine.

Chairman ROCKEFELLER. Okay. We're going to close. First I have an exciting announcement. I ask unanimous consent that the Chairman in consultation with the Vice Chairman be authorized to make a part of the record statements and letters received in connection with this hearing.

If you've gotten over that excitement, I want to tell you both that you were absolutely superb. There's sort of a very direct way of answering questions, which sometimes people at higher levels don't do. So I feel very happy. And we will all be working on this together.

The hearing is adjourned.

[Whereupon, at 3:58 p.m., the Committee adjourned.]